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In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

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REPLY BRIEF FOR THE PETITIONERS

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The petition in this case presents two issues—whether the Supreme Court of Arkansas correctly denied retroactive effect to this Court's June 23, 1987 decision in *Scheiner*; and whether it correctly denied even prospective effect to *Scheiner*, by limiting the application of *Scheiner* to taxes collected after Justice Blackmun's August 14, 1987 escrow order. With respect to the former question, we suggested that this case is a paradigm of a recurring issue that is often likely to arise when a state tax is invalidated on federal grounds, so that this Court's consideration of the manner in which the *Chevron* test applies to flat highway taxes (an issue that alone is in litigation in five states and involves hundreds of millions

of dollars of *Scheiner*-based refund claims) will give courts guidance in numerous other circumstances that are bound to arise in the future. With respect to the post-*Scheiner* issue, we contend that the decision below, which conflicts with a decision of Maryland's highest court, so far departs from the duty of a state court to honor the decisions of this Court as to call for corrective action.

Respondents' opposition makes no claim that the issues presented herein are unimportant or otherwise unworthy of the Court's attention, but rather offers a series of assertions as to why the decision below was correct on the merits. While these contentions need not be resolved at the current stage of the litigation, we respond briefly to them to show that they afford no basis either to deny the petition or to affirm the judgment of the Arkansas Supreme Court.

1. Respondents begin by pointing out (Opp. 1-2) that while most states allowed trucks to operate at a weight of 80,000 pounds, prior to 1983 Arkansas had enforced a lower 73,280-pound limit, which made it a "barrier state" and seriously impeded the flow of interstate commerce. Not surprisingly, Arkansas' removal of this obstruction to commerce was of substantial benefit to interstate truckers.[1] Arkansas apparently contends that because this benefit exceeded the amount of the HUE tax adopted contemporaneously therewith, petitioners would be given a windfall if refunds of the unconstitutional tax were ordered. This argument completely overlooks the vice that proved to be fatal to the HUE tax, which was

[1] The State's decision to increase truck weight limits to 80,000 pounds was not motivated by the desire to facilitate interstate commerce, but rather by the fear that its lower limit would result in a complete loss of federal highway monies. See Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 133(a), 96 Stat. 2123 (1983) (codified as amended at 23 U.S.C. § 127 (1982)).

not that its size exceeded the benefits "conferred" by the cessation of Arkansas' disruption of commerce, but that it discriminated against out-of-state operators and in favor of Arkansas-based trucks (which, of course, also benefited from the increased weight limit). Whether petitioners derived benefit from being able to operate at heavier weights is wholly irrelevant to whether they are entitled to a refund of the unconstitutional taxes exacted from them.

2. Respondents next suggest (Opp. 3) that Arkansas' tax was different from the Pennsylvania taxes invalidated in *Scheiner*. It is not quite clear how the existence of differences in the taxes would be relevant here, but in fact there are *no* material differences between the HUE tax and the Pennsylvania axle tax: Both taxes discriminated in favor of in-state operators because they did not vary with the amount of highway use above a relatively low level—2,000 miles per year in the case of Pennsylvania, 3,500 miles in the case of Arkansas (see Pet. 25-26).

3. Respondents point out (Opp. 4) that even if this Court were to hold *Scheiner* fully retroactive, state law grounds such as sovereign immunity might bar a refund. While such a holding on remand would itself raise constitutional issues distinct from those presented here,[2] that is hardly a ground for denying certiorari to review the nonretroactivity ruling that is the subject of this petition.

4. Respondents then (Opp. 5-6) make a half-hearted attempt to suggest that the first prong of the *Chevron*

[2] Both *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), and *Ward* v. *Love County*, 253 U.S. 17 (1920), hold that the Fourteenth Amendment bars states from interposing sovereign immunity as a basis for withholding refunds of unconstitutional taxes. In fact, however, Arkansas appears to recognize a right under the state constitution to secure refunds in a case like this. See *Streight* v. *Ragland*, 280 Ark. 206, 209 n.6, 655 S.W.2d 459, 461 n.6 (1983); *City of Little Rock* v. *Cash*, 277 Ark. 494, 513, 644 S.W.2d 229, 237 (1982), cert. denied, 462 U.S. 1111 (1983).

test, which looks to the existence of justifiable reliance on old law by the proponents of nonretroactivity, is satisfied here because a number of other states had also adopted flat highway taxes and because this Court's decision in *Tyler Pipe* was held nonretroactive by the Supreme Court of Washington.[3] No effort is made to respond to our discussion of this point (Pet. 15-19). Respondents do not dispute that the state of the law regarding the constitutionality of flat taxes was at best (from the State's standpoint) uncertain when the HUE tax was adopted, that it is important to know who bears the risk of unconstitutionality when a state enacts a questionable tax statute, or that this case is an excellent vehicle for addressing that important question.[4]

5. Respondents address the second prong of the *Chevron* test (Opp. 6-8) by complaining that a judgment requiring payment of refunds will bring a halt to highway construction in Arkansas and by accusing petitioners of being unwilling to pay their fair share of taxes. These baseless assertions are quite irrelevant to the question whether retroactive application of *Scheiner* will advance Commerce Clause policies. In fact, if refunds are required, ATA has made clear its willingness to work with the respondents and the state courts to devise a means to pay them with minimum disruption to the State's highway maintenance program. See Reply Brief for Appellants in No. 85-101 (Ark. Sup. Ct.) at 14-16.[5] And Arkansas has already enacted a replacement truck tax which is generating millions of dollars for highway maintenance.

[3] We note in this connection that, subsequent to the filing of the petition in this case, the New Jersey Tax Court ruled on the retroactivity of *Scheiner*. *American Trucking Ass'ns* v. *Kline*, No. 07-14-1667-85MVT (Sept. 8, 1988). In a lengthy and thorough evaluation of the application of the *Chevron* test to flat highway taxes, that court concluded that not one of the three criteria for nonretroactivity was satisfied and held that *Scheiner* must be given full retroactive application.

[4] As we explain in the petition (at 17 n.13, 19-20 & n.15, 23), the situation in *National Can* was entirely different, both in terms of the legislative perspective at the time of enactment of the multiple activities exemption struck down in *Tyler Pipe* and in light of the fact that the taxpayers in that case, while exposed to the theoretical risk of multiple taxation, had suffered little or no actual injury and would, unlike petitioners, have paid the same amount of tax under a valid law as they had under the one that was struck down.

We argued that retroactive application of decisions like *Scheiner* is needed to discourage state legislatures from enacting constitutionally questionable laws that favor in-state business interests. Respondents reply that constitutional concerns are indeed at the forefront when state legislatures consider new laws and that any suggestion to the contrary shows contempt for the legislative process (Opp. 7-8). But the history of Arkansas highway taxes belies that assertion. When the current weight-distance tax, which replaced the HUE tax last October, was before the Arkansas legislature, the Attorney General of Arkansas rendered a formal opinion that certain exemptions contained therein were unconstitutional. (That opinion is reproduced as an Appendix hereto.) Two days later, the new tax passed, with the questionable exemptions intact and with no evidence that the least attention had been paid to the Attorney General's advice.

6. On the equities of retroactive application of *Scheiner*, respondents' argument (Opp. 8-9) is that petitioners benefited from Arkansas' federally-compelled abandonment of its "barrier state" role (see pp. 2-3, *supra*), that a ruling in petitioners' favor could produce refunds for some Arkansas carriers, and that truckers

[5] Indeed, much of the disruption predicted by respondents is dubious in any event, since the bulk of the funding for the construction of the major Arkansas thoroughfares travelled by trucks that weigh more than 73,280 pounds is supplied not by Arkansas but by federal grants.

prefer not to pay taxes. None of these reasons is at all relevant to *Chevron*'s third prong, let alone amounts to the kind of powerful inequity that might justify a refusal to give retroactive effect to a decision of this Court.

First, as noted above, the fact that the taxed activity is economically beneficial to the taxpayer simply sheds no light on whether refunds are required after a tax has been found unconstitutional. Second, the suggestion that some undeserving taxpayers would receive refunds is unpersuasive. It is not clear that federal law would require refunds to taxpayers who could be shown to have *benefited* from a discrimination; and even if it did, the numbers are small compared to the thousands of non-Arkansas carriers who suffered real and substantial economic injury from the discriminatory HUE tax. Third, whether or not truckers enjoy paying taxes, the trucking industry has never taken the position that it should not pay its fair share of highway construction and maintenance costs. Indeed, the petition recognizes (see Pet. 22) that any refunds that are required will likely be financed by taxes on trucks. Petitioners ask only that the taxes they pay not be infected by invidious discrimination or other constitutional defects.

7. Finally, respondents make no meaningful effort whatever to defend the validity of the decision of the Arkansas Supreme Court to permit the State to retain taxes paid, before establishment of the escrow, for the tax year beginning July 1, 1987. Their contention appears to be (see Opp 11-12) that state courts may decide for themselves, free from oversight by this Court, when to give effect to decisions holding state taxes unconstitutional. No doubt the decision to allow the State to retain millions of dollars of taxes exacted for road use *after* the date of the *Scheiner* decision is an "excellent resolution" (Opp. 12) from respondents' perspective, but it is also a

blatant disregard of the commands of federal law, which, we respectfully submit, calls for correction by this Court.

Respectfully submitted.

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APPENDIX

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[SEAL]

STEVE CLARK
Attorney General

October 7, 1987

Honorable Bill Clinton
Governor of Arkansas
State Capitol Building
2nd Floor
Little Rock, AR 72201

Re: Proposed Weight Distance Truck Tax Legislation

Dear Governor Clinton:

I will be leaving the country on October 7 for a trip to Russia. In light of that, I thought it prudent that I review the proposed bills and apprise you of my thoughts regarding the proposed truck tax legislation as submitted by the Arkansas Highway and Transportation Department, the Arkansas Poultry Federation, and the Arkansas Bus and Truck Group. As you know the U.S. Supreme Court's decision in *ATA v. Scheiner*, declared unconstitutional the flat tax legislation in Pennsylvania which is similar in many respects to the provisions of Arkansas' Act 685 of 1983. Our highway use tax is under constitutional attack and now pending in the State Supreme Court after remand from the U.S. Supreme Court in the case of *ATA v. Gray*.

What is needed now is a tax that does not in any respect discriminate or violate the Equal Protection Clause as applied to various highway user groups. Considerable attention must be directed to avoiding a violation of the Commerce Clause by not taxing in a disparate fashion out-of-state truckers versus domestic truckers.

The proposed legislation sponsored by the Arkansas Highway and Transportation Department would impose a 3¢ per mile tax on all loaded motor vehicles between 73,280 and 80,000 lbs. Unladened motor vehicles registered in that weight range would not be taxed. This tax is to apply across the board and does not appear to discriminate in any way against out-of-state carriers in favor of domestic carriers. Therefore, it seems to avoid the Commerce Clause issues inherent in the *Scheiner* case and implied by the U.S. Supreme Court in *ATA v. Gray*. The one possible problem with the bill proposed by the Arkansas Highway and Transportation Department is that it exempts from taxation any vehicles carrying unfinished and unprocessed products (including farm, forest and minerals) from the point of harvesting or severance from the land to the point where it first undergoes any processing. There appears to be no rational basis supporting this discrimination in favor of these products versus any other materials. To the extent that this tax does not favor domestic carriers versus foreign carriers, it would not appear to pose any Commerce Clause problems. Equal Protection problems are, however, inherent in the bill so long as it contains the aforementioned exemptions.

It appears to me that the legislation proposed by the Arkansas Poultry Federation is also constitutionally suspect. This proposed bill seeks to avoid taxation for farm, timber, or mineral products carried by heavy motor vehicles. While this bill would only exempt those products so long as they were not *fully* processed, the effect would

be to virtually exclude the poultry and timber industry from taxation in its transportation of those goods. It is difficult to conceive of a rational basis for exempting these products from taxation while continuing to levy the tax on all other products in the heavy motor vehicle class. It is significant to note that this is not a general revenue raising measure. Rather, it may be reasonably characterized as a use tax particularly designed and imposed to off-set specific costs incurred by the State in connection with the use of its highways. The emergency clause, contained in Section 11 of the proposed bill, exhibits this specific purpose in stating as follows:

> It is hereby found and determined by the General Assembly that the current highway-user tax and fee structure does not allocate highway costs in an equitable manner among the various classes of highway users, and that the increased weight limits enacted by the 74th Assembly has jeopardized the investment in the State's highways necessitating the annual expenditure of additional monies to negate such damage; and that only by the immediate passage of the Act may highway-user taxes and fees be adjusted to more equitably equalize the allocation of highway costs among the various classes of highway users and provide vitally needed additional funds to solve the aforementioned problems. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

The Equal Protection Clause would, it seems, in this instance compel a showing that the exemptions proposed by the Arkansas Poultry Federation are rationally related to the objective sought to be achieved by the legislation, that is, the generation of revenues "in an equitable manner among the various classes of highway users." The exemptions set forth in the Arkansas Poultry Federa-

tion Bill would in all likelihood fail to withstand this review. I should note, however, that I see nothing inherently wrong with their proposed 2¢ per mile tax to be levied against all heavy trucks (over 73,280 lbs.).

Finally, the Arkansas Bus and Truck Group has proposed a bill that would tax the use of motor fuels by trucks depending on their loaded weight. It begins at 1¢ per gallon of motor fuel for trucks with a loaded weight between 40 thousand and 56 thousand pounds and goes to 5¢ per gallon for motor fuel used in trucks of gross loaded weight of over 73,280 lbs. This is the simplest of the proposed tax bills, and it seems least constitutionally suspect. I find nothing in this proposed bill to raise any constitutional red flags.

In summary, Governor, I believe that the proposed bill from the Arkansas Poultry Federation is based upon constitutionally unsound exemptions for enumerated industries in the State. The bill as proposed by the Arkansas Highway and Transportation Department seems constitutionally sound with the exception of the clause granting an exemption for natural resources in their unprocessed state. Finally, I see nothing constitutionally suspect with respect to the bill as proposed by the Arkansas Bus and Truck Group.

This letter is written to you solely as a statement of my position on the bills as proposed, with an eye toward avoiding further costly litigation and the problems inherent in the present Act 685 of 1983.

Sincerely,

/s/ Steve Clark
STEVE CLARK
Attorney General